Filed 7/20/12 P. v. Stafford CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DARRELL STAFFORD, Defendant and Appellant.	A132989 (Sonoma County Super. Ct. No. SCR589032)

Defendant was convicted following a jury trial of robbery (Pen. Code, § 211), and the trial court found that sentence enhancement allegations for a prior robbery conviction and prior strike were true (Pen. Code, §§ 667, 1170.12). He argues in this appeal that the trial court erred by admitting his pretrial statements and the testimony of his mother. We conclude that no prejudicial error in the admission of evidence occurred, and affirm the judgment.

STATEMENT OF FACTS

Jacquelyn Athey, a teller at the Coddingtown branch of the Exchange Bank on Guerneville Road in Santa Rosa, testified that at around 4:30 p.m. on August 23, 2010, a man she positively identified at trial as defendant approached her teller window. Athey described him as "Latin," with short black hair and a tattoo on his neck, "about 5'10"," 160 pounds, 40 to 50 years old, wearing rectangular thick-frame glasses and a gray shirt. Defendant told Athey, "This is a bank robbery. I want you to stay calm." He also displayed a note on the back of a deposit slip that read, "Bank robbery." Defendant demanded "large bills" from Athey, first hundreds, then twenties. Athey was "terrified,"

and gave defendant the bills he demanded. Once defendant walked out of the bank Athey activated the silent alarm.

The police arrived soon thereafter. Athey gave a description of the bank robber to a police officer, the FBI, and the bank's risk management officer Michael Leonard. She also viewed and identified still-frame image photos of the bank robber taken by the bank's video surveillance cameras.

Defendant's mother, Ida Riedeman, testified that defendant called her between 5:00 and 5:30 that same evening. Defendant was then temporarily staying at Riedeman's apartment in Santa Rosa in the aftermath of a "split up" with his wife. Riedeman perceived that recently defendant was "using drugs and alcohol" again, and he repeatedly told her that he "needed to go back to rehab." When defendant called that evening, he asked to use Riedeman's car to travel to Union City to take his daughter to dinner for her birthday. He arrived at Riedeman's house and mentioned that he "finally got paid" $2,000 for construction work he had done in Lake County. Riedeman asked defendant to return the car by 6:00 the next morning. He took the car keys and left, but returned with the car in the morning, then left the apartment.

Later that morning Riedeman noticed a story in the local newspaper that the Exchange Bank had been robbed, along with a "little picture" that accompanied the story. She immediately called defendant and asked him to "come back to the apartment." When defendant asked, "Why," Riedeman said, "Darrell, you robbed the Exchange Bank on Guerneville Highway." Defendant replied, "I did." Riedeman then told defendant, "Darrell you're in the paper. And you need to come home for [*sic*] we can take you and turn you in, because I don't want you to get hurt." The phone conversation then ended. Riedeman tried to call defendant thereafter, "but he wouldn't answer."

Riedeman called the Santa Rosa Police Department at the number listed in the newspaper story, and officers came to her apartment later that day. She directed the officers to a gray, long-sleeve T-shirt on defendant's bed that he was wearing the day

before.[1] Later that afternoon, Riedeman discovered two $100 bills in the trunk of her car, which had not been there a few days before. She gave the bills to the detectives.

A warrant was subsequently issued for defendant's arrest. On the night of August 30, 2010, defendant "turned himself in on the warrant" at the City of Santa Rosa Main Adult Detention Facility. Defendant was placed in handcuffs, and taken to a patrol vehicle by Santa Rosa police officer Kyle Boyd. Defendant spontaneously said, "This is a huge weight off my shoulders. I just want to get this done and over with and get on with my life."

Defendant was transported to the Santa Rosa Police Department. Around 10:45, he was taken to an interview room by Detective Stephen Rakoski, accompanied by Detective Brian Reynolds. Detective Rakoski intended to interview defendant to determine "what his involvement is or was" in the Exchange Bank robbery, although he did not advise defendant that he was "going to conduct an interview with him."[2]

Before defendant was given his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)), he mentioned to the officers that he had been "kicking for the week," attempting to get "off drugs" and dealing with an overdose by his brother. Defendant repeatedly asserted that he "went on a blackout," and "couldn't tell" the officers if he "did the bank robbery or not." He also stated that his mother told him he was "wanted by the feds" for the bank robbery, but he was "so strung out" he didn't "know what to do" until his wife and kids convinced him to turn himself in to the police.

After receiving his *Miranda* admonitions defendant explained that he had "been clean over ten years," but once he moved into his mother's house he began taking valium, heroin, speed and drinking brandy daily due to the stress of breaking up with his wife. Detective Rakoski told defendant he was interested in "a robbery at [the] Exchange Bank" a week before. Defendant again stated the he "was out of it," and did not know if he "walked in that bank and took anything." He recalled borrowing his mother's car to

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[1] The shirt was *not* the one depicted in the surveillance photo of the bank robber.

[2] A tape recording of part of the interview was played for the jury.

take his daughter to dinner for her birthday. He drove to Union City, where he had beer, brandy, and a "good size shot of speed with heroin," before he picked up his daughter and wife at about 8:00 or 8:30 the night of the robbery. After dinner at a restaurant in Hayward, he took them home, then went to a friend's house in Santa Rosa where he got "loaded," before he returned his mother's car to her apartment about 5:00 a.m.

Defendant told the officer that an hour later his mother called to ask if he robbed a bank. He said, "Why? What? No." Riedeman told him the photo of the Exchange Bank robber "sure looks like you." Defendant started "freaking out." He was "strung out," so he stayed with a friend for a week to get "cleaned up" and "off everything," then his wife brought him to the police station earlier that night.

Detective Rakoski then asked defendant if he recalled "being in Exchange Bank?" Defendant stated that he did not remember "that part of the day," and did not know where the bank was located. Detective Rakoski indicated that he had a photo of defendant "inside [the] Exchange Bank at the teller window." Defendant replied: "I mean til I talk to my attorney I don't know how to what to tell you guys. What do you want me to tell you?" Defendant added that he did not know if he was "guilty or not guilty." The officer advised defendant that for the past week he had been "building this case" against him, and wanted defendant to "be honest." Defendant proclaimed: "Well then I'll talk to my lawyer and we'll go from there. That's the best I can give you right now cause I have really, I can't tell you I walked in that bank." After an exchange where defendant repeated that he would "rather talk" to his lawyer or have his attorney advise him "on which way I need to do this," and declared, "I better exercise my *Miranda* Rights," Detective Rakoski asked to take photos of defendant to document the interview.

A week after the robbery and the day after defendant's arrest, Athey viewed a lineup of six photographs prepared by Detective Rakoski. She quickly selected defendant's photograph, number four in the lineup, as the man she recognized "from that day" of the robbery. Athey particularly recognized the shape of his face, his skin tone, jaw line, and eyebrows.

DISCUSSION

I. The Admission of Defendant's Pretrial Statements.

Defendant argues that his statements made to Detective Rakoski were inadmissible. He presents two distinct claims that his statements were subject to exclusion under *Miranda*, *supra*, 384 U.S. 436. First, he contends the "pre-warning admissions" he made before the detective advised him of his *Miranda* rights "were involuntary as a matter of law." Second, he asserts that both before and after hearing his *Miranda* rights he invoked his right to counsel, and all subsequent statements were therefore involuntary.

The trial court found that defendant "spontaneously made" the statement in the patrol vehicle to Officer Boyd, without any "type of interrogation that would imply anything improper," and excluded only the statements made by defendant after he unequivocally invoked his *Miranda* rights by stating – on page 22, at line 585 of the interview transcript— "Well then I'll talk to my lawyer and we'll go from there."[3] The prior statements by defendant during the interview were admitted by the court as "voluntarily given" following a "proper *Miranda* warning."

The fundamental *Miranda* principles are well settled. "The privilege against self-incrimination provided by the Fifth Amendment of the federal Constitution is protected in 'inherently coercive' circumstances by the requirement that a suspect not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel." (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) "In *Edwards v. Arizona* (1981) 451 U.S. 477, . . . , the court added 'a second layer of prophylaxis for the *Miranda* right to counsel' (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 176, . . .), when it held that, once a suspect has asserted his or her right to counsel during custodial interrogation, the interrogation must cease and the suspect 'is not subject to further interrogation by the

[3] The court also excluded that part of the interview beginning on page 21, line 555, to the invocation of *Miranda* rights on page 22, line 585, as "not relevant" and inviting the jurors to "speculate about punishment."

authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' [Citation.]" (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1122; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 55; *People v. Storm* (2002) 28 Cal.4th 1007, 1021; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.) "[I]f, in violation of this rule, interrogation continues of an in-custody suspect [who has asserted the right to remain silent or] asked for but has not been provided with counsel, the suspect's responses are presumptively involuntary and therefore 'are inadmissible as substantive evidence at trial.' [Citations.] Such exclusion is not required, however, when the 'suspect personally "initiates further communication, exchanges, or conversations" with the authorities.' [Citations.]" (*People v. Sapp* (2003) 31 Cal.4th 240, 266; see also *People v. Davis* (2005) 36 Cal.4th 510, 551–552.)

A. The Pre-warning Statements.

We first examine the statements made by defendant before his *Miranda* rights were administered. The safeguards of *Miranda* are granted to a suspect "only if he is subjected to custodial interrogation." (*People v. Cressy* (1996) 47 Cal.App.4th 981, 986.) " 'Absent "custodial interrogation," *Miranda* simply does not come into play.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) "Custodial interrogation has two components." (*People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088.) While defendant was unquestionably in custody, "The Supreme Court has recognized that 'the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect *in custody is subjected to interrogation*.' [Citations.]" (*People v. Nguyen* (2005) 132 Cal.App.4th 350, 355–356.)

"Interrogation ' "refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." ' [Citations.]" (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 732.) Interrogation occurs "whenever a person in custody is subjected to either express questioning or its functional equivalent." (*Rhode Island v. Innis* (1980) 446 U.S. 291,

300–301; see also *People v. Haley* (2004) 34 Cal.4th 283, 300.) "Clearly, not all conversation between an officer and a suspect constitutes interrogation. The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response." (*People v. Clark* (1993) 5 Cal.4th 950, 985; see also *People v. Haley, supra,* at p. 301.)

"This is an objective standard. 'The subjective intent of the [officer] is relevant but not conclusive. . . .' [Citations.]" (*People v. Wader* (1993) 5 Cal.4th 610, 637.) The definition of interrogation " 'focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.' [Citation.]" (*People v. Haley, supra,* 34 Cal.4th 283, 300, italics omitted.)

" 'We review the trial court's finding regarding whether interrogation occurred for substantial evidence or clear error.' [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034.) "[W]e apply an independent standard of review, doing so 'in light of the record in its entirety, including "all the surrounding circumstances—both the characteristics of the accused and the details of the [encounter]" . . . .' [Citations.]" (*People v. Neal* (2003) 31 Cal.4th 63, 80.) "But 'we accept the trial court's factual findings, based on its resolution of factual disputes, its choices among conflicting inferences, and its evaluations of witness credibility, provided that these findings are supported by substantial evidence.' [Citation.]" (*People v. Coffman and Marlow, supra,* 34 Cal.4th 1, 55.)

We agree with the trial court that the statements made by defendant *before* he was given *Miranda* warnings were not the product of an interrogation. Defendant was clearly in custody, but the interview did not reach the level of an interrogation. Defendant initiated the conversation by willingly declaring as he was taken to the patrol vehicle, "This is a huge weight off my shoulders. I just want to get this done and over with and get on with my life." During the subsequent interview, Detectives Rakoski and Reynolds introduced themselves and asked defendant how he was doing. Unprompted by the officers, defendant stated that during the past week his brother suffered a drug overdose, and he was "strung out" and attempting to get "off drugs." Defendant mentioned that his mother told him he was "wanted by the feds" for bank robbery, but he was "on a serious blackout" and "couldn't tell" the officers if he "did it or not." Before receiving his *Miranda* rights he also made the rather confusing comment, again unsolicited by the officers: "I can give a I can't tell you, should I talk to an attorney that Darrell walked into that bank cause I was on blackout."

While the atmosphere was custodial, nothing in the officers' comments were designed to elicit incriminating information from defendant. Introducing themselves, asking how defendant was doing, and remarking "right" when defendant discussed his actions the past week was not questioning or communication likely to induce defendant to incriminate himself. Interrogation " 'refers to questioning initiated by the police or its functional equivalent, not voluntary conversation. . . .' [Citations.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 387.) Viewing the pre-*Miranda*-warning conversation from defendant's objective perspective, no interrogation occurred. Thus, all the statements made before defendant was admonished were admissible.

B. The Post-warning Statements.

After defendant was given his *Miranda* warnings, an interrogation ensued. Detective Rakoski asked defendant to explain his "mental" state, and "what's going on" while he was "on the run" and found his "brother passed out." The issue from that point on in the interview is whether defendant waived his *Miranda* rights and, if so, when he decided to revoke the waiver.

The record convincingly illustrates that once defendant received his *Miranda* warnings he willingly decided to speak with the officers. He proceeded to freely discuss his actions between the commission of the robbery and his arrest. When Detective Rakoski directly asked defendant about the "robbery at Exchange Bank" a week before, he professed that he was not coherent on the afternoon of the robbery, but began discussing his activities that day: driving to his wife's house in Union City in the evening, taking his daughter to dinner for her birthday at the Olive Garden restaurant, drinking and taking drugs before he returned his mother's car to Santa Rosa, talking to his mother about the photograph in the newspaper article, hiding out at a friend's house, and getting off drugs before he turned himself in to the police. We find that defendant waived his *Miranda* rights.

We further find that the waiver was voluntary. "A defendant's statements challenged as involuntary are inadmissible at trial unless the prosecution proves by a preponderance of the evidence that they were voluntary." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093.) " 'In determining whether a confession was voluntary, " '[t]he question is whether defendant's choice to confess was not "essentially free" because his [or her] will was overborne.' " [Citation.] Whether the confession was voluntary depends upon the totality of the circumstances. . . .' [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 436.) "The question is whether the statement is the product of an ' "essentially free and unconstrained choice" ' or whether the defendant's ' "will has been overborne and his capacity for self-determination critically impaired" ' by coercion. [Citation.] Relevant considerations are ' "the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health." ' [Citation.]" (*Ibid.*) We discern nothing in the record, either in the duration, length, or nature of the interrogation, that indicates coercion or lack of exercise of free will by defendant. (*People v. Clark, supra,* 5 Cal.4th 950, 986–987.)

The remaining inquiry focuses on the point in the interrogation at which defendant rescinded his waiver. "After a knowing and voluntary waiver, interrogation may proceed

‘ “until and unless the suspect clearly requests an attorney.” ’ [Citation.]” (*People v. Dykes* (2009) 46 Cal.4th 731, 751.) “Once the defendant has waived his or her right to counsel, as we have determined defendant did [when he was advised on his *Miranda* rights during the] interview, if the defendant has a change of heart, he or she must invoke the right to counsel *unambiguously* before the authorities are required to cease the questioning. [Citation.] The suspect must articulate sufficiently clearly his or her desire to have counsel present so that a reasonable officer in the circumstances would understand the statement to be a request for an attorney. [Citation.] ‘[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer *in light of the circumstances* would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.’ [Citation.]” (*People v. Williams, supra,* 49 Cal.4th 405, 432.) “[A] reviewing court—like the trial court in the first instance—must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant’s reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant’s subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant.” (*People v. Gonzalez, supra,* 34 Cal.4th 1111, 1125.)

Defendant never stated to the officers that he no longer wanted to proceed with the interrogation. He mentioned an attorney twice during the interview – before the court found that he asserted his *Miranda* rights – but he did not make an unambiguous request for the assistance of counsel. First, before the interrogation ensued or defendant was asked any questions, he gratuitously remarked that he could not tell the officers “should I talk to an attorney that Darrell walked into that bank cause I was on blackout.” When Detective Rakoski subsequently proposed to show defendant the surveillance photograph taken “inside Exchange Bank at the teller window,” defendant stated: “I mean til I talk to my attorney I don’t know how to what to tell you guys.” On neither occasion did defendant unequivocally invoke his right to counsel. At best, he made a contingent assertion that he may be interested in talking to counsel before he further discussed the

case. The conditional nature of the reference to an attorney did not constitute a clear, unambiguous assertion of the right to counsel. (*People v. Gonzalez, supra,* 34 Cal.4th 1111, 1127.) "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." (*Davis v. United States* (1994) 512 U.S. 452, 459.) We conclude that defendant did not assert his right to counsel until, as the trial court found, he stated, "Well then I'll talk to my lawyer and we'll go from there." Defendant's prior statements were properly admitted by the trial court.

II. The Admission of Testimony by Defendant's Mother.

Defendant also challenges the admission of testimony by his mother, Ida Riedeman, in which she recounted her telephone conversation with him after she noticed a surveillance photograph of the perpetrator of the robbery at the Exchange Bank in the local newspaper. He claims that Riedeman offered testimony that was "inadmissible and unreliable hearsay," and violated his right to "confront the witnesses against him."

The permissible content of Riedeman's testimony was discussed before she took the stand. The trial court ruled that Riedeman "can testify about what she did after" viewing the "newspaper article and a photograph in the newspaper," and "what she and Mr. Stafford discussed." Riedeman then testified that she called defendant after viewing the photograph. When asked what drew her "attention to that picture," Riedeman replied that "it was Darrell." The court sustained defense counsel's "improper opinion" objection, struck the answer, and directed the prosecutor to "rephrase the question." The prosecutor asked Riedeman the reason for her call to defendant, and she explained that she was "worried about" defendant because she "knew" the photograph "was him." Again, the response was stricken. Riedeman proceeded to testify that she told defendant he "robbed the Exchange Bank on Guerneville Highway," to which he replied, "I did." Riedeman then told defendant, "Darrell you're in the paper," and advised him to come home. Another objection by defense counsel prompted the trial court to advise the jury

that "whatever opinions" are offered by witnesses, "it's the jury's decision in this case whether Mr. Stafford did, in fact, rob the bank."

Defendant makes several related objections to Riedeman's testimony in this appeal. He argues that the prosecution "repeatedly violated" trial court's announced limitation on the nature of the testimony Riedeman was permitted to offer related to her telephone conversation with defendant. He claims that two specific responses from Riedeman violated the court's evidentiary ruling: her testimony that the newspaper photograph "was Darrell," and that she was worried "because I knew it was him." He also contends that "Riedeman's statements were hearsay, based on many unfounded assumptions, and uttered out of court," without opportunity for "proper examination" at trial. Finally, defendant maintains that the trial court erred by denying his motion for mistrial made on grounds of "violation of the court's order" and the admission of "improper testimony."

We begin by observing that the only specific testimony defendant cites as inadmissible was not hearsay at all. "Hearsay is 'evidence of a *statement* that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.' (Evid. Code, § 1200, subd. (a).)" (*People v. Cowan* (2010) 50 Cal.4th 401, 472, italics added; see also *People v. Kovacich* (2011) 201 Cal.App.4th 863, 884.) Riedeman's testimony that she knew the photograph depicted defendant was not a statement at all, but rather an in-court expression of her opinion that the bank surveillance photograph depicted defendant. Her lay opinion was admissible. "A lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of [her] testimony." (*People v. Farnam* (2002) 28 Cal.4th 107, 153; see also *People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1608.) The decision whether to permit lay opinion rests in the sound discretion of the trial court. (*People v. Medina* (1990) 51 Cal.3d 870, 887.) Riedeman's opinion was properly based on her observation and intimate knowledge of defendant, and was beneficial to the jury's appreciation of concern for him that induced her decision to recommend that he return home to contact the police.

Nor did the testimony contravene the court's order that Riedeman was entitled to mention "what she did after" viewing the "photograph in the newspaper," and "what she and Mr. Stafford discussed." Riedeman's perception of the identity of the subject of the photograph reflected on the motivation for her conversation with defendant, and the topics they discussed.

Defendant has not pointed to any other explicit portions of Riedeman's testimony that he claims were inadmissible, other than to claim that his "purported failure to deny his mother's accusation that he had robbed a bank" was erroneously admitted as an "adoptive admission." Riedeman testified that she said to defendant, "Darrell you robbed the Exchange Bank on Guerneville Highway.' And he said, 'I did.' " Defendant submits that the phone conversation lacked the necessary "foundation of reliability."

Defendant's statement, "I did," when accused of the robbery by his mother, qualifies as an admission or adoptive admission. "An established exception to the hearsay rule is an admission by a party opponent. Section 1220 provides: 'Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.' Section 1221 defines an adoptive admission as a statement 'of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.' For the adoptive admission exception to apply, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether a defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide." (*Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 83; see also *People v. Silva* (1988) 45 Cal.3d 604, 624; *People v. Bowman* (2011) 202 Cal.App.4th 353, 365.) " ' " '[A] typical example of an adoptive admission is the accusatory statement to a criminal defendant made by a person other than a police officer, and defendant's conduct of silence, or his words or equivocal and evasive replies in response. . . .' [Citation.]" [Citation.] . . . [Citation.] " 'When a person makes a

statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.' [Citation.]" [Citation.]' [Citations.] Whether the statement constitutes an adoptive admission is 'determined upon the facts and circumstances therein presented.' [Citations.]" (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1120–1121.) The context and substance of the telephone conversation sustain a finding that defendant affirmed or adopted his mother's accusations. We further find that the testimony had the requisite foundation of reliability. (See *People v. Davis*, *supra*, 36 Cal.4th 510, 537–538.)

The remainder of Riedeman's testimony was not offered to prove the truth of the statements, but instead to clarify the testimony of the witness, disclose the reason she made the call to defendant, and to explain the sequence of events that followed, including defendant's ultimate arrest and interrogation. (See *People v. Silva, supra,* 45 Cal.3d 604, 624.) The credibility of the witness who testified that she made these accusations and observed defendant's response, and the weight to be given her testimony, were in issue and subject to cross-examination before the jury. (*People v. Preston* (1973) 9 Cal.3d 308, 315–316.) The trial court admonished the jury to consider Riedeman's testimony to explain defendant's response to her inquiries, not to prove the "identity" of defendant as the robber, and instructed the jury to determine defendant's guilt based on "the sum total of the evidence that's presented," rather than the opinion of any witness. We conclude that Riedeman's testimony was properly admitted, and no denial of defendant's right to confrontation occurred.

Finally, the trial court did not err by denying the motion for mistrial. "A motion for mistrial should be granted ' "only when a party's chances of receiving a fair trial have been irreparably damaged." ' [Citation.] Whether a particular incident is so prejudicial that it warrants a mistrial 'requires a nuanced, fact-based analysis,' which is best performed by the trial court. [Citation.] We review a trial court's order denying a motion for mistrial under the deferential abuse of discretion standard. [Citation.] 'Under this

standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1094.)

Riedeman's identification of the photograph, although stricken by the trial court, was admissible as lay opinion testimony. The court carefully and thoroughly cautioned the jury not to consider her testimony to prove the "truth of the matter" of defendant's identity as the robber. "We presume the jury followed this instruction." (*People v. Davis, supra*, 36 Cal.4th 510, 537.) The remaining evidence that established defendant's identity as the robber – particularly the bank teller's positive and very convincing identification – was overwhelming. Defendant also recounted essentially the same version of the telephone conversation with Riedeman in his statement to the police. Admission of Riedeman's testimony did not irreparably damage defendant's chances of receiving a fair trial.

Accordingly, the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Banke, J.